CHANGE OF NEIGHBORHOOD AS AFFECTING THE ENFORCEABILITY OF RESTRICTIVE COVENANTS RELATING TO LAND.

As a general rule equity will enforce by injunction restrictive covenants affecting land.[1] It is said that the theory upon which such relief is given is the prevention of irreparable injury, but courts have not been inclined to investigate very closely the extent of the injury. It has been held that the mere fact that there has been, or threatens to be, a breach is sufficient ground for equitable interference.[2] Equity, however, will take all the circumstances connected with the breach into consideration and will not grant an injunction if those circumstances show that it would be inequitable to do so.

One class of such cases is where there are building restrictions imposed upon land owners to effect some particular design, and there has been such a change in the character of the neighborhood and character of improvements, that the original purpose for which the covenant was entered into could not be carried out, even if all parties were compelled to observe it. When such a condition of affairs exists equity leaves the party aggrieved to his remedy at law.

The New York Court of Appeals recently decided such a case, *Batchelor v. Hinkle*,[3] and refused to compel the observance of a covenant, entered into in 1849, to set all buildings to be erected on certain property back five feet from the street line to form court yards in front of the residences, because the neighborhood since that time had been so encroached upon by business that it was no longer desirable for residences. The decision has met with some adverse criticism from the bar and it is proposed to examine it and see if it is supported by authority.

The right to specific performance of a contract, by the decree of a court of equity, rests in judicial discretion, and may be granted or withheld upon a consideration of all the circumstances.[4] In such cases equity demands that a complainant seek redress in

[1] *Barrett v. Blagrave*, 5 Ves. 55; *Watertown v. Cowen*, 4 Paige, Ch. 510.

[2] *Tipping v. Eckersley*, 2 K. & J. 264.

[3] *Asheville Street Railway v. Asheville*, 109 N. C. 688; *Batchelor v. Hinkle*, Vol. 50, No. 130, N. Y. Law Journal.

[4] *Seymour v. Delaney*, 6 Johns Ch. 222; *Margraf v. Muir*, 57 N. Y. 155.

good faith and will deny him a remedy if he is in any way responsible for the breach. If a vendor, having taken from each of several purchasers of plots of building land, formerly the same estate, a covenant to build only in a specified manner, has permitted, without interference, material breaches of the covenants to be committed by some of the purchasers, he cannot obtain an injunction to compel another purchaser to observe the same covenant.[5] If a seller owns unimproved city property and conveys to one party inserting in that conveyance restrictions designed to make the section residential and preserve its fitness for that purpose, he cannot compel the observance of those restrictions if he thereafter conveys to other purchasers without restriction, because he has put it out of his power to carry out the plan of using the property for residences only.[6] The complainant must never be guilty of such laches in prosecuting his remedy as would lead one to think that he meant to abandon his right to have the restrictions observed.[7] Nor may he have equitable relief if he himself has done anything contrary to the spirit of the covenant.[8] He must show that the remedy he seeks would, under the circumstances, be an equitable and just remedy, and where it will be of litle value to the complainant and will result in great harm to the defendant, it will generally not be granted. Courts will never compel performance of a contract specifically when, looking at all the circumstances on both sides, it is apparent that injustice would thereby be done.[9]

Where the covenant was entered into for a definite purpose, but, owing to subsequent developments, that purpose cannot be accomplished by compelling its observance, equity will not interfere.[10] In *Sayers v. Collyer* an injunction was refused because the character of the neighborhood had become so changed that the original purpose—the keeping of the estate as a residential property—for which the covenant had been enterd into, had

[5] *Peek v. Matthews,* (1867) L. R. Equity Cases 515.

[6] *Duncan v. Central Passenger Railway Co.,* 85 Ky. 525.

[7] *Roper v. Williams,* T. & R. 18; *Orne v. Fridenberg,* 143 Pa. St. 487; *Ocean City Association v. Schurch,* 57 U. J. Eq. 268.

[8] *Page v. Murray,* 46 N. J. Eq. 325.

[9] *Miles v. The Dover Furnace Iron Co.,* 125 N. Y. 294; *Clark v. Rochester, Lockport & N. Falls R. R. Co.,* 18 Barb. 350; *Conger v. N. Y., West Shore & Buffalo R. R. Co.,* 120 N. Y. 29; *Starkie v. Richmond,* 155 Mass. 188.

[10] *Duke of Bedford v. Trustees of the British Museum,* 2 M. & K. 552.

failed, and it would under the circumstances be inequitable to enforce specific performance of the covenant.[11] The Supreme Judicial Court of Massachusetts laid down the same rule where the restrictions were designed to make the locality a suitable one for residences. The Court said that, since the changed condition of the locality had resulted from other causes than breaches of the covenants, to enforce them could have no other effect than to harass and injure the defendant, without effecting the purpose for which the restrictions were originally made.[12] In New York there is a line of cases beginning with the well-known Columbia College cases, which lay down the same rule, recognizing that though a contract may be fair and just when made, yet a court of equity ought not to interfere to enforce it, if subsequent events have made performance by the defendant so onerous, that its enforcement would entail great hardships on him and cause little or no benefit to the plaintiff.[13] Other courts have also recognized the equity of this doctrine.[14] The New York courts, however, recognize that a change in the character of the neighborhood form residential to business is not a reason for refusing specific performance of the covenant, where it appears that the covenant is just as valuable for the latter as for the former.[15]

The decision in the principal case is undoubtedly sound and is amply supported by authority but the Court unnecessarily makes a statement in the last paragraph which has provoked adverse criticism. It says that "a covenant may be enforceable by injunction against one person, and as to another violating the same covenant an injunction may be refused." It is said that by this statement the Court introduces uncertainty into the law. It is submitted that the statement of the Court is sound and only expresses what is a fact, namely, that the law is more or less uncertain. There may be two complainants who are entitled to the benefit of a restrictive covenant. The one may have by laches or other misconduct deprived himself of his right to an injunction but his laches or misconduct would not affect the right of the other com-

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[11] L. R. 24 Chancery Division, 180.

[12] *Jackson v. Stevenson,* 156 Mass. 496.

[13] *Trustees of Columbia College v. Thatcher,* 87 N. Y. 311; *Amerman v. Deane,* 132 N. Y. 355; *McClure v. Leaycraft,* 183 N. Y. 36.

[14] *Ewertsen v. Gerstenberg,* 186 Ill. 344; *Page v. Murray, supra; Orne v. Fridenberg, supra.*

[15] *Zipp v. Barker,* 40 App. Div. 1.

plainant. The circumstances in the case of one complainant may be such that equity would refuse to grant its extraordinary remedy because to grant it would be inequitable but it does not follow at all from this that the other complainant could not make out a case where it would be equitable to grant an injunction. If the circumstances are altered and one party is seeking an equitable remedy against two violators of the same covenant, it is easy to conceive that he might make out a great deal stronger case against the one than against the other. He might be able to show that because of the violation of the one he was being greatly injured and was entitled to equitable redress, but as to the other the circumstances might be such that, though the same covenant was being violated, if equity interfered, it would only result in causing great loss to the respondent without benefiting the complainant.

ACTION BY A WIFE AGAINST HER HUSBAND FOR A TORT TO THE PERSON.

In the recent case of *Brown v. Brown,* (89 Atl. 889, Conn.) it was held that, in view of the Married Woman's Act (Public Acts, Conn., 1877, ch. 14), which had the effect of abolishing the common law unity of husband and wife, a wife may now maintain an action for false imprisonment and assault against her husband, such an action not being against public policy.

It is inevitably necessary, in reviewing a decision of so far-reaching an effect to consider somewhat the development of the rights of femes covert from the earliest times. At common law, since the unity of husband and wife rendered it impossible for the wife to sue the husband, it necessarily followed that she could not sue him for a tort committed against her.[1] This was considered decisive of the matter, as indeed it was, but the dictates of public policy, preventing such an action by reason of the supposed consequent disruption of the home, were also often referred to.[2] Nor could a wife maintain a suit after divorce for a tort committed during the coveture by her husband;[3] for her dis-

[1] *Abbott v. Abbott,* 67 Me. 304; *Phillips v. Barnet,* 1 Q. B. 436, 1 Jagg. Torts 463; *Freethy v. Freethy,* 42 Barb. 641; *Peters v. Peters,* 42 Iowa 182.

[2] See cases cited *supra,* note 1.

[3] *Abbot v. Abbott supra; Strom v. Strom,* 98 Minn. 427; *Main v. Main,* 46 Ill. App. 106; *Nickerson v. Nickerson,* 65 Tex. 281.